

(1990) 09 MAD CK 0063
In the Madras High Court
Case No : Writ Petition No. 14562 of 1989

M. Abdul Hakim

APPELLANT

Vs

State and Govt. of India

RESPONDENT

Date of Decision : 07-09-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)(i)

Citation : (1991) LW(Cri) 57

Hon'ble Judges : Swamidurai, J; Bellie, J

Bench : Division Bench

Advocate : R. Muthukrishnan, for the Appellant; G. Krishnamurthy, for Public Prosecutor and K. Ilias Ali, Additional Central Government Standing Counsel, for the Respondent

Judgement

Bellie, J.—This writ petition has been filed by one Abdul Hakim for issuance of a writ of habeas corpus against an order of detention passed against his cousin Mohammed Ali on 22-5-1989 under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), hereinafter referred to as the COFEPOSA Act, with a view to preventing him from smuggling goods.

2. As per the grounds of detention the detenu when on 6-3-1989 he arrived at Madras International Airport as a passenger from Singapore, on search of his bags by the Customs Intelligence Officers, was found to have concealed 11 gold bars weighing 50 grams each with foreign markings for which he had no valid permit and therefore he attempted to smuggle gold into India. Then he gave a confession statement. Considering the relevant materials the first Respondent-Government of Tamil Nadu was satisfied that he had indulged in smuggling goods and they were also satisfied that if he were let to remain at large he would indulge in such activities and recourse to normal criminal law would not have the desired effect of effectively preventing him from indulging in such activities, and therefore it was necessary that he must be detained in pursuance of an order of

detention passed u/s 3(1)(i) of the COFEPOSA Act. Accordingly an order was passed. The second Respondent then passed an order u/s 9 of the Act on 18-8-1989.

3. This order of detention is sought to be assailed on various grounds in the petition. It is first contended that the detaining authority failed to consider the bail application filed by the detenu wherein he has retracted his alleged confession and thus there is non-application of mind of the detaining authority to a relevant and important fact. This charge is denied in the counter statement filed by the first Respondent--State Government. On a perusal of the detention order we find that the detaining authority has clearly mentioned therein about the bail application filed by the detenu and the order of the Magistrate passed thereon. Therefore we find no substance in this ground raised by the detenu.

4. It is next contended that there is inordinate delay in implementing the detention order and this is indicative that the order of detention is not genuine. It is submitted that while the date of order is 22-5-1989 the detenu was arrested after a delay of 72 days i.e. on 2-8-1989. This contention is repudiated by the first Respondent stating that the detention order was sent to the Deputy Inspector General of Police for execution on the very date of the order i.e., on 22-5-1989, the detenu was absconding and evading arrest, the Deputy Inspector General of Police was reminded on 25-7-1989, and that there was no delay on the part of the first Respondent in implementing the order. The two facts viz., that the order for execution was sent on the date of order itself, i.e., on 22-5-1989 and that the Deputy Inspector General of Police was reminded of the matter on 25-7-1989 render it difficult to believe that there was inaction of the first Respondent in implementing the order.

It is further contended for the Respondents that the detenu was granted bail on 13-3-1989 on condition that he shall appear before the Assistant Collector of Customs (R and I) on every Monday at noon and the detenu was complying with the order for some time but he failed to appear before the Assistant Collector from 17-4-1989 and he absconded. In this connection the relevant register maintained by the Assistant Collector was produced before us and that reveals that the detenu has appeared before the Assistant Collector and he has signed the register in proof of his appearance but there was no such signature from 17-4-1989, and according to the learned Public Prosecutor this shows that, may be, on getting some hint that a detention order was being passed against him the detenu stopped going to the Assistant Collector for reporting, and absconded. We find some force in this submission. It is argued for the detenu that the grounds of detention read as though the detenu was complying with the conditions of bail and nothing about his non-compliance is noted. Possibly the detenu did not comply with the condition only after the Customs authorities sent the proposal for his detention. Even otherwise we do not see any point of consequence in it.

In a very recent decision of the Supreme Court in Abdul Salam alias Thiyyan Vs.

Union of India and others, a delay of 2 1/2 months in arresting the detenu was held to the effect that it was not at all a delay. In that case also the State contended that the detenu made himself scarce. An observation in that decision is very relevant and worth keeping in mind. It is stated that;

That a part there is no decision where a Court has gone to the extent of holding that a mere delay in arresting the accused rendered the detention invalid.

It has been further observed that:

In the instant case, the delay, if at all, is only 2 1/2 months and the explanation offered for the delay is reasonable.

It is however contended on behalf of the detenu that the facts in that case are different from the facts in our case. We do not see much difference. As seen above, as in our case, in that case also the case of the State was that the detenu was absconding. It is further argued that if the detenu failed to sign the register at the Customs Office as directed in the bail application, the Custom Authorities should have filed a petition for cancelling the bail but no such thing has been done. The non-filing of such petition does not necessarily mean that the detenu was not absconding. The authorities had contemplated passing detention order, and therefore perhaps they did not think it necessary to file a petition for cancellation of the bail order.

For the detenu two decisions in *Sk. Nizamuddin Vs. State of West Bengal*, and *T.A. Abdul Rahaman Vs. State of Kerala and others*, were read out wherein it is stated that an unexplained or unsatisfactory delay in arresting the detenu would render the detention order invalid. But in our Case, as we have held above, we are satisfied with the explanation given by the State for the delay of just 2 1/2 months. A decision in *Mohammed Masoom Vs. Union of India and Others*, was also relied on for the detenu. In that case there was an unexplained delay from 25.1.1975 to 27.5.1977 i.e. two years and four months. This is certainly a very long delay. Therefore this decision will not help the detenu.

5. It is next contended that a show cause notice was issued to the detenu after the detention order was passed and copy of that notice and reply thereto were not placed before the second Respondent who passed the declaration u/s 9 of the Act and thus there is no application of mind of the second Respondent to relevant facts and this vitiates the detention. As to this the first Respondent--State Government would contend that within the time prescribed u/s 3(2) i.e. within 10 days they have sent all the records, and the show cause notice was issued subsequently. The second Respondent--Central Government in its counter would state that the declaration was made on 18-8-1989 whereas the reply to the show cause notice was received on 21-8-1989, and as such the question of considering the reply to the show cause notice at the time of passing the declaration does not arise. On verification of the records which was submitted for our perusal including the adjudication order it was found that the reply to the show cause notice which is dated 7-8-1989 was indeed received by the Collector of Customs

only on 21-8-1989. As such the declaration having been made on 18-8-1989 earlier to the receipt of the reply no question of non-consideration of the reply to the show cause notice arises. Reply to show cause notice of course is an important document that must be considered by the declaring authority but not the show cause notice itself. Thus we find no merit in this contention.

6. Coming to the next point raised by the detenu, it is stated that show cause notice was not placed before the Advisory Board and this is a serious non-observance of procedure and therefore it vitiates the detention order. In this connection the learned Counsel for the detenu relies on an unreported decision of this Court in *P. Mani v. State of Tamil Nadu* W.P. No. 6582 of 1989 dated 25-11-1987 to which one of us (Bellie, J.) was a party. In this judgment, of course, it was held that non-placing of show cause notice before the Advisory Board which was issued subsequent to the detention order vitiates the detention. But it does not appear to be a good law considering the judgment of the Supreme Court in *Raverdy Marc Germain Jules Vs. State of Maharashtra and Others*, which was not brought to the notice of the Court in that case. Before advertng to the Supreme Court decision it would be better to refer to the relevant section in the Act relating to the function of the Advisory Board. Section 8 Clause (c) reads to the effect that the Advisory Board has to consider the reference made to it on the materials placed before it by the detaining authority. It does not show that any material that comes into being subsequent to the reference must also be placed before the Advisory Board. The Advisory Board is then empowered to call for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned (detenu), and if, in any particular case it considers it essential so to do or the person concerned wishes to be heard in person, after hearing him in person, prepare its report. Therefore if the Advisory Board thinks it necessary that it must consider any material other than those placed before it can call for the same on its own accord or at the instance of the detenu or it may also personally hear the detenu. From this it would appear that it is not necessary that the detaining authority should send to the Advisory Board any material even if it is not a material of much consequence like a show cause notice, on its own. It must be remembered that show cause notice is sent to none other than the detenu himself and he must be in possession of it, and even if he is not in such possession, he can always represent to the Advisory Board for calling for such record.

Now, in the abovesaid Supreme Court decision *Raverdy Marc Germain Jules Vs. State of Maharashtra and Others*, , a statement retracting a confession statement made by the detenu which was received by the detaining authority subsequent to the order of detention was not sent to the Advisory Board. It was argued that on this account the detention order was vitiated. Against this it was argued on behalf of the detaining authority that what all the materials considered by the detaining authority have been sent to the Advisory Board and the retraction statement having not been considered by the detaining authority since it was

received subsequently that need not be sent to the Advisory Board. The Supreme Court stated that this contention required deeper examination, but however the detenu being a highly qualified and highly placed person it is unthinkable that he would not have informed the Advisory Board that he had retracted his confession statement. From this it is manifest that mere non-placing of any material even important ones like retraction statement will not ipso facto render a detention order invalid. In our case the material concerned is only a show cause notice and the detenu himself is the receiver of it, and it is not the case of the detenu that he had no opportunity before the Advisory Board to report to it that the copy of show cause notice has not been placed before the Advisory Board. It must be remembered here that this point has not been raised by the detenu in the affidavit filed in support of the petition and it was only at the time of arguments it was raised by the learned Counsel for the detenu and therefore the Respondents had no sufficient opportunity to rebut this charge by way of filing a counter. Thus considering we do not think that there is merit in the contention that the detention order is vitiated because the show cause notice has not been placed before the Advisory Board.

7. It is next argued that there is delay in considering the representation made by the detenu. This point also has not been raised in the affidavit filed in support of the petition and this was just raised at the time of arguments. In this regard the learned Public Prosecutor filed a memo containing particulars of the receipt of the representation and its consideration. It reads thus:

The representation was received on 26.8.1989; parawar remarks called for on 26-8-1989; parawar remarks sent by the sponsoring authority on 31-8-1989; parawar remarks received on 1-9-1989; file was sent to Public (SC) Department on 1-9-89; file was returned from that department on 1-9-89; file submitted to the Under Secretary on 2-9-89; holidays on 3-9-1989; the file was approved by the Under Secretary on 5-9-1989, Secretary (Public) passed the file on 5-9-1989; Addl. Secretary, (Law) passed the file on 6-9-1989; Minister for Law passed the file on 7-9-1989; and the representation was rejected on 7-9-1989.

It can be seen that there is absolutely no delay in consideration of the representation. Thus this contention lacks any substance.

8. Thus we find no merit in any of the points raised for the detenu. In the result, therefore, the petition is dismissed.